Public Prosecutor v Rosli bin Rikidin

HIGH COURT (TEMERLOH) — CRIMINAL TRIAL NO 45–15 OF 2002
MOHAMED APANDI ALI J
6 FEBRUARY 2007

Evidence — Agent provocateur — Use of — Whether police officer who had no previous encounter with accused prior to arrest was agent provocateur — Whether officer was agent provocateur — Dangerous Drugs Act 1952 s 40A

The accused was charged for trafficking 9712g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). Evidence was adduced that moments prior to the stopping of the motorcar PCA 20 by Chief Inspector Azhar's ('SP8') ambush party, one detective Lance Corporal Redzuan Yap ('SP9'), who was not a member of the ambush party, had stopped the same motorcar. There was an alleged conversation whereby SP9 enquired from the accused, who was then driving the motorcar, with the following words 'Mana barang?' The accused then came out from the motorcar and opened the boot of the motorcar. SP9 then walked away from the scene and SP8 then sprang into action, and the motorcar was again stopped and examined, resulting in the discovery of the drugs in the boot of the motorcar. In the course of the trial, in view of the evidence of SP9, in particular his alleged enquiry of 'mana barang?' to the accused person and the accused's action of opening the boot of the motorcar, there emerged the primary issue of whether such evidence of enquiry and reaction of the accused towards the enquiry could be accepted as evidence. Following the accused's counsel objection to such evidence, the deputy prosecutor relied on the provision of s 40A(2) of the Act, ie the provision regarding agent provocateur. In the face of such reliance, it was clear that the issues of possession and trafficking had to be examined on the basis that SP9 was an agent provocateur. The evidence showed that SP9 had never met the accused prior to the encounter on the night of the accused's arrest. At the end of the prosecutions case, it was found that the prosecution had failed to make out a prima facie case against the accused and therefore he was acquitted and discharged without calling for his defence. The prosecution appealed.

Held, acquitting and discharging the accused:

(1) SP9 was not an agent provocateur and therefore his evidence would have to be subjected to the normal laws of evidence in respect of admissibility and value. Section 40A of the Act is an exception to the general rule in the law of evidence. It is contrary to the maxims of *Nemo tenetur se ipsum accusare* and *Nemo debet prodere se ipsum*. Strict compliance to its characteristics and qualifications must be adhered to, before an agent could be clothed and accepted as an agent provocateur (see para 19).

(2) These were grave doubts as to the actual exhibits recovered and the safe custody of them, from the time of recovery until actual packing and sealing and eventual handling over to the chemist for analysis. There was also doubt as to who actually was the informer in this case. According to SP8, the informer was one Chinese man, who gave the information to ASP Kassim. In another breath, earlier the same witness said the person who received the information was SP9. SP9 made no mention of any informer or information. There thus existed a mystery as to the information and informer. Even if s 40 of the Act accorded protection of informers of any evidence that might expose their identity, there must be some cogency and consistency of the evidence relating to the information received (see paras 26–27).

(3) There was insufficient unfolding of evidence that resulted in serious gaps in the narrative of the prosecution's case. It was a case of a bungled 'sting operation' where too many officers were involved and yet the key operator to the operation was not called or even made available. The prosecution had thus failed to prove a prima facie case (see paras 28–29).

[Bahasa Malaysia summary

Tertuduh telah didakwa mengedar 9712g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Bukti yang dikemukakan pada ketika itu sebelum memberhentikan motokar PCA 20 oleh pihak serang hendap Ketua Inspektor Azhar ('SP8'), salah seorang detektif Lans Kopral Redzuan Yap ('SP9'), yang mana bukannya ahli pihak serang hendap, telah memberhentikan motokar yang sama dan terdapat satu dakwaan perbualan yang mana SP9 bertanyakan daripada tertuduh, yang mana memandu motokar dengan ayat berikut: 'Mana barang?' Tertuduh kemudiannya keluar daripada motokar dan membuka but motokar. SP9 kemudiannya pergi dari tempat itu dan SP8 kemudiannya dengan segera bertindak, dan motokar tersebut sekali lagi diberhentikan dan diperiksa yang menyebabkan penemuan dadah di dalam but motokar. Semasa perbicaraan, berdasarkan keterangan SP9, berkenaan dengan pertanyaan yang didakwa 'mana barang?' kepada tertuduh dan tindakan tertuduh membuka but motokar, menimbulkan isu utama sama ada keterangan pertanyaan dan tindak balas tertuduh terhadap pertanyaan seharusnya diterima sebagai bukti. Selanjutnya peguamcara tertuduh membantah keterangan tersebut, timbalan pendakwaraya bergantung kepada peruntukan s 40A(2) Akta, iaitu peruntukan berkenaan dengan egen provokasi. Bukti menunjukkan bahawa SP9 tidak pernah bertemu tertuduh sebelum pertemuan pada malam penangkapan tertuduh. Pada akhir kes pendakwaan, adalah didapati bahawa pendakwaan telah gagal menunjukkan kes prima facie terhadap tertuduh dan oleh itu beliau dibebaskan dan dilepaskan tanpa memanggil untuk pembelaannya. Pendakwa merayu.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) SP9 bukannya seorang ejen provokasi dan oleh itu keterangannya adalah tertakluk kepada undang-undang keterangan biasa berkenaan dengan boleh terima dan nilai. Seksyen 40A Akta adalah pengecualian terhadap kaedah am

dalam undang-undang keterangan. Adalah bertentangan kepada pepatah *Nemo tenetur se ipsum accusare* dan *Nemo debet prodere se ipsum*. Pematuhan yang ketat kepada sifat dan kelayakannya mestilah dipatuhi, sebelum seseorang ejen boleh lengkap dan diterima sebagai seorang ejen provokasi (lihat perenggan 19).

(2) Ini adalah keraguan yang serius kepada ekshibit sebenar yang diperolehi dan keselamatan simpanan mereka, daripada masa penemuan sehinggalah pembungkusan dan penutupan yang sebenar dan akhirnya menguruskannya ke ahli kimia untuk dianalisa. Terdapat juga keraguan siapa sebenarnya adalah pemberi maklumat di dalam kes ini. Menurut SP8, pemberi maklumat adalah seorang lelaki Cina yang memberikan maklumat kepada ASP Kassim. Sebelum itu, saksi yang sama telah mengatakan orang yang menerima maklumat adalah SP9. SP9 tidak menyatakan mana-mana pemberi maklumat ataupun maklumat. Oleh itu wujudnya satu misteri berkenaan dengan maklumat dan pemberi maklumat. Walau pun s 40 Akta memberikan perlindungan kepada pemberi maklumat untuk mana-mana keterangan yang boleh membongkar identity mereka, keterangan mereka mestilah yakin dan konsistan berkenaan dengan maklumat yang diterima (lihat perenggan 26–27).

(3) Terdapatnya pembongkaran bukti yang tidak mencukupi yang menyebabkan jurang yang serius dalam naratif kes pendakwaan. Ianya adalah satu kes pencerobohan 'operasi penyengat' yang mana terlalu ramai pegawai yang terlibat dan pengendali operasi masih belum dipanggil atau disediakan. Pendakwaan oleh itu gagal membuktikan satu kes prima facie (lihat perenggan 28–29).]

Notes

For cases on use of agent provocateur, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 279–280.

Cases referred to

Namasiyiam & Ors v PP [1987] 2 MLJ 336 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)
Teja Singh & Mohamed Nasir v PP [1950] MLJ 71 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (folld)

Legislation referred to

Criminal Procedure Code s 180(2)
Dangerous Drugs Act 1952 ss 37(h), 39B(1)(a), 40, 40A

Kalmizah bte Salleh (Ahmad Rosli bin Mohd Sham & Hamdan bin Hamzah with her) (Deputy Public Prosecutor) for the prosecution.
Gurbachan Singh (Bachan & Kartar) for the accused.

Mohamed Apandi Ali J:

[1] The accused person was charged for trafficking 9712g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The charge reads as follows:

> Bahawa kamu pada 28 Februari 2002 jam lebih kurang 9 malam di kawasan letak kereta Hotel Park, di dalam Daerah Temerloh, di dalam negeri Pahang, telah mengedar dadah berbahaya iaitu 9712 gram cannabis. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] For reasons best known to the prosecution, as usual even though the actual alleged transaction of drug trafficking involved a motor vehicle, such fact was never mentioned in the charge.

[3] Anyway at the end of the prosecutions case, it was found that the prosecution has failed to make out a prima facie case against the accused and wherefore he was acquitted and discharged without calling for his defence. The prosecution is not happy with the said acquittal decision and thus this appeal.

BRIEF FACTS OF THE CASE

[4] At about 9pm on 28 February 2002, acting on information received, a police party led by Chief Inspector Azhar bin Ahmad ('SP8') stopped a motorcar bearing registration No PCA 20, within the parking area of Hotel Green Park in Temerloh. The motorcar was driven by the accused person and he was alone, when he was stopped by the police party. Upon being stopped, the accused refused to get out of the motorcar but after some pushing and pulling of the door, the accused was detained by Chief Inspector Azhar. The accused was given a body-search and motorcar was then examined by Chief Inspector Azhar and the drugs in the form of 10 slabs, were found in the boot in the motorcar.

[5] Evidence was also adduced that moments prior to the stopping of the motorcar PCA 20 by Chief Inspector Azhar's ambush party, one Detective Lance Corporal Redzuan Yap ('SP9'), who was not a member of the ambush party, had stopped the same motorcar and there was an alleged conversation whereby SP9 enquired from the accused person, who was then driving the motorcar, with the following word: 'Mana barang?' The accused person then came out from the motorcar and opened the boot of the motorcar. SP9 then walked away from the scene and Chief Inspector Azhar (SP8) then sprang into action, and the motorcar was again stopped and examined, that resulted in the discovery of the drugs in the boot of the motorcar.

ISSUES TO BE DETERMINED

[6] At the end of the case for the prosecution, from facts adduced, the court concluded that it was satisfied that the drugs were cannabis as defined under s 2 of the Dangerous Drugs Act 1952. But these remained two main issues that need to be determined, namely the issue of possession and trafficking of the drugs.

[7] In the course of the trial, in view of the evidence of SP9, Det/Lance Corporal Redzuan Yap, in particular his alleged enquiry of 'mana barang?' to the accused person and the accused's action of opening the boot of the motorcar, there emerged the primary issue of whether such evidence of enquiry and reaction of the accused towards the enquiry can be accepted as evidence or not? The learned counsel for the accused raised objections to such evidence and after a short submission, the learned deputy declared that he is relying on the provision of s 40A(2) of the Dangerous Drugs Act 1952, ie, the provision regarding agent provocateur (see p 61 of Notes of Evidence). In the face of such reliance, it is clear that the issues of possession and trafficking as to be examined on the basis that SP9 is an agent provocateur. It is a do or die issue for the prosecution.

ISSUE OF AGENT PROVOCATEUR

[8] What is an agent provocateur? Although it is referred to in the Dangerous Drugs Act 1952, there is no legal definition as to what is an agent provocateur. Section 40A of the Dangerous Drugs Act 1952 reads as follows:

> 40A. Evidence of agent provocateur *admissible*.
>
> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law of the provisions of this Act or any other written law to the contrary, and that *the agent provocateur is a police officer* whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act *shall be admissible as evidence at his trial*.

[9] Section 40A of the Act merely speaks of the evidential admissibility and value of the testimony of an agent provocateur. Section 40A has not altered but on the other hand reaffirmed the substantive rule of law that *entrapment* (or use of agent provocateur) does not per se afford a defence to a criminal charge.

Black's Law Dictionary (7th Ed) defines an agent provocateur as:

> (1) An undercover agent who instigates or participates in a crime, often by infiltrating a group involved in suspected illegal conduct, to expose and punish criminal activity;

(2) Person who entraps or entices another to break the law and then informs against the other as a lawbreaker.

[10] Archbold, *Criminal Pleading Evidence and Practice* (2002 Ed) carries the definition of the UK Royal Commission on Police Powers 1928, which defined on agent provocateur as:

> ... a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.

[11] The *Concise Oxford Dictionary* (9th Ed) defines an agent provocateur as:

> a person employed to detect suspected offenders by tempting them to overt self-incriminating action. [French, = provocative agent]

[12] The keywords in the above definitions of an agent provocateur are closely related to the activities of instigation, participation, enticement and temptation that resulted in an entrapment of the suspect or accused person. To my mind to qualify as an agent provocateur there must be an overt act or acts of the agent to instigate by way of active participation that eventually enticed and tempted the intended target to commit the criminal offence.

[13] Search and references to case law does not render much help as to the definition of an agent provocateur. Nevertheless the cases do throw some light as to what sort of activity or transaction that can transform an agent into an agent provocateur. In the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433, the Supreme Court deliberated at length the fatal failure of the prosecution to call or make available an informer who later transformed into an agent provocateur. It is noted that the agent provocateur who posed as a buyer of the drugs was earlier introduced to the accused person and there were various negotiations for the sale and purchase of the drugs with the accused person. These must be facts involving the activities of the agent provocateur vis-a-vis the accused persons, prior to the actual entrapment. Refer also to the case of *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336.

[14] The other case law in the form of *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71; *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, highlighted the fact that the evidence of an agent provocateur need no corroboration to found a finding by the court. In the later case of *Public Prosecutor v Mohamed Halipah*, a police detective was introduced to the accused by an informer and these was some bargaining as to the price of the heroin and the amount, and eventually the price was agreed upon, before the accused produced the drugs.

[15] In the light of the above, is SP9, Det./Lance Corporal Redzuan Yap an agent provocateur? a claimed by the learned deputy pubic prosecutor. From facts of the case that were unfolded before me, the role played by SP9, in brief are as what he said in his examination-in-chief, which reads as follows:

Pada 28 Februari 2002, saya telah diarah oleh ASP Kassim, iaitu Pegawai Turus Risikan Pahang untuk menjadi wakil pembeli ganja dari seorang lelaki Melayu. Saya diarah untuk tunggu di tempat letak kereta di Hotel Green Park, Temerloh. Saya diarah untuk berurusan dengan lelaki Melayu yang membawa kereta Proton. Sebelum itu ada taklimat diberi. Taklimat diberi oleh ASP Kassim di Rest House Temerloh jam 7 malam pada 28 Februari 2002. Dalam taklimat dinyatakan seorang lelaki Melayu memakai kereta Proton Aeroback warna biru gelap No Pendaftaran PCA 20. Lelaki itu akan hantar barang dadah kepada pembeli. Saya ditugaskan menjadi wakil kepada pembeli. Tidak ada maklumat lain berkait lelaki Melayu itu. Urusan jualbeli dibuat oleh siapa, saya tidak tahu. Bagaimana urusan jualbeli, pun saya tidak tahu. Bagaimana orang itu akan mengenali saya sebagai wakil pembeli ada diberi semasa taklimat. Saya diarah berdiri di situ. Siapa pembeli pun saya tidak tahu. Saya pakai seluar pendek baju kemeja, dan pakai selipar. Saya diarahkan untuk berpakaian begitu. Saya menyamar sebagai orang Cina.

[16] From the above testimony of SP9, and his consequential cross-examination, it is clear to conclude that:

(1) SP9 never met the accused prior to the encounter on the night of the accused's arrest;

(2) he has no idea as to how the accused person looks like;

(3) he did not have any negotiation to purchase the drugs with the accused person;

(4) he did not know whom he is supposed to represent when he met the accused;

(5) he did not arrange for the accused to supply the drugs;

(6) he did not instigate the accused to supply the drugs;

(7) he did not entice the accused to supply the drugs; and

(8) that he has no inkling as to the price and quantity of the drugs involved.

[17] It is noted that there was no other evidence from any other witness to unfold further as who was the actual informer and what transpired prior to the briefing on 28 February 2002 and the actual attendance and contents of the said briefing. SP9's superior, ASP Kassim was not called or made available.

[18] In view of the above, based on the law and facts, I conclude that SP 9, Det/Lance Corporal Redzuan Yap is not an agent provocateur and therefore his evidence will have to be subjected to the normal laws an evidence in respect of admissibility and value. Section 40A of the Dangerous Drugs Act 1952 is an exception to the general rule in the law of evidence. It is contrary to the maxims of *Nemo tenetur se ipsum accusare* and *Nemo debet prodere se ipsum*. Strict compliance to its characteristics and qualifications must be adhered to, before an agent can be clothed and accepted as an agent provocateur.

OTHER DEFECTS IN THE PROSECUTION'S CASE

[19] In his submission, the learned DPP (at p 80 of the notes of evidence) submitted that SP9 as the agent provocateur is evidence to proof knowledge. It is trite

law that knowledge alone is insufficient to prove possession. On the facts of the case, it is my finding that there is no nexus between the drugs found in the boot of the motorcar and the accused. Mere discovery of drugs in the motorcar, namely in a boot does not ipso facto prove possession of the drugs by the driver of the motorcar. This is particularly so when the drugs were not found in any secret compartment, whereby the presumption under s 37(h) of the Dangerous Drugs Act 1952 can be invoked. The cases of *Syed All Bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132 and *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 is sufficiently clear on this issue.

[20] In my *ex tempore* decision, at the end of the prosecution's case, I also indicated that there are other gaps in their case. These gaps are related to and consequential to the numerous unnecessary handlings of the exhibits by so many police officers in this case. In brief the movements of the exhibits can be related in the following manner and order:

(1) It was first discovered, of course, by the leader of the raiding party, SP8, C/Insp Azhar bin Ahmad, at 9pm on 28 February 2002. He lodged a police report (exh P18) and issued a search list (as per exh P24);

(2) SP8, then handed the exhibits to SP6, ASP Gunarajan on the same day, at 11.15 pm. A document denoting handing over and receiving the exhibits was executed and tendered as exh P19;

(3) SP8 then handed the exhibits to SP7, C/Insp Yusri at 4pm on 1 March 2002. A handing-over and receiving document was executed and tendered as exh P21;

(4) SP7 then handed the exhibits to SP10, C/Insp Mohd Zati on the same day (ie, 1 March 2002) at 9.45pm. There was then again a document denoting handing-over and receiving the exhibits, and the document was tendered as exh P22;

(5) SP10, then handed the exhibits to SP3, C/Insp Mohd Roslan at the police headquarter in Bukit Aman, on 4 March 2002 @ 3.20pm;

(6) SP3 later handed back the exhibits to SP10, on the same day (ie, on 4 March 2002) at 4.30pm. Document to denote handing-over and receiving of the exhibits was tendered and marked as exhibit P10; and finally

(7) The exhibits were later sent to the chemist for analysis on 5 March 2002 and upon receiving it back it was kept at the police exhibit store on 19 August 2002.

[21] Upon perusal of the evidence, it is discovered that prior to the exhibits been handed over to SP10, C/Insp Mohd Zati, who was the investigating officer, the exhibits were not wrapped or sealed.

[22] Upon analysis of the documents tendered to show the movements of the exhibits, to my astonishment, it is discovered that what was listed in exh P19 does not tally with the items listed in exh P21! Exhibit P19 nevertheless tallies with exh P22. In both the exhs P19 and P22, the items listed are:

(1) 10 ketul mampatan tumbuhan kering yang disyaki dadah (ganja); dan

(2) sebuah kereta No PCA 20 dan anak kunci.

[23] These two documents, P19 and P22 made no mention or reference to a black bag with the wordings, 'Athletic Sport Clothing' as stated in the search list P24 issued by SP9, Chief Insp Azhar and in his police report, P18. Bearing in mind that P19 is the first document to show the movement of the exhibits from the raiding officer (ie, men of the ground) to the initial investigating officer, SP6, ASP Gunarajah, the question that naturally emerged is: what happen to the black bag? After all it was narrated that 9 out of the 10 slabs of the drugs were recovered from the said bag.

[24] On the movement of exhibits too, it is noted that SP3, Chief Insp Mohd Roslan did not indicate as to where, how and when the exhibits were kept during the more that one hour the exhibits were in his custody. Safe custody of such exhibits is particularly imperative, in view of the fact that up to that material time, the exhibits were still not wrapped and sealed.

[25] From the above evaluation of the evidence, these are grave doubts as to the actual exhibits recovered and the safe custody of them, from the time of recovery until actual packing and sealing and eventual handling over to the chemist for analysis.

[26] Lastly there was also doubt as to who actually was the informer in this case. According to SP8, Chief Inspector Azhar the informer is one Chinese man, who gave the information to ASP Kassim (see p 54 of notes of evidence). In another breath, earlier (at p 45 of note of evidence) the same witness said the person who received the information was D/Kpl Ridzuan Yap (SP9). SP9 made no mention of any informer or information. There thus exist a mystery as to the information and informer. Even though s 40 of the Dangerous Drugs Act 1952 accorded protection of informers of any evidence that might expose their identity, surely these must be some cogency and consistency of the evidence relating to the information received.

CONCLUSION

[27] After maximum evaluation of the evidence of the prosecution, this court therefore conclude that there is insufficient unfolding of evidence that resulted in serious gaps in the narrative of the prosecution's case. It is a case of a bungled 'sting operation' where too many officers were involved and yet the key operator to the operation was not called or even made available.

[28] In the upshot, I conclude that the prosecution has failed to prove a prima facie case and pursuant to the provisions of s 180(2) of the Criminal Procedure Code, the accused is acquitted and discharged without calling for his defence.

Accused acquitted and discharged.

Reported by Loo Lai Mee